

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ADVENT COMPANIES, INC.,

Plaintiff and Appellant,

v.

SJC II/FOURTH AND HAVEN, LLC,

Defendant and Respondent.

G055609

(Super. Ct. No. 30-2016-00852678)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Deborah C. Servino, Judge. Reversed and remanded.

Ostergar Law Group and Treg A. Julander; Edward M. Picozzi for Plaintiff and Appellant.

Hodel Wilks, Matthew A. Hodel and Fred L. Wilks for Defendant and Respondent.

*

*

*

Advent Companies, Inc., (Advent) appeals from the trial court’s judgment entering the referee’s decision in a trial by reference (Code Civ. Proc., § 638) denying Advent its contractual attorney fees as the prevailing party under Civil Code section 1717 in litigation against SJC II/Fourth and Haven, LLC, (SJC). Advent recovered \$419,000 on its breach of contract and declaratory judgment claims in proceedings before the referee, while SJC recovered only \$18,500 on its liquidated damages counterclaim. As this court explained in *de la Cuesta v. Benham* (2011) 193 Cal.App.4th 1287, 1295 (*de la Cuesta*), “If the results in a case are lopsided in terms of one party obtaining ‘greater relief’ than the other in comparative terms, it may be an abuse of discretion for the trial court *not* to recognize that the party obtaining the ‘greater’ relief was indeed the prevailing party.” That is the case here. We therefore reverse the judgment and remand the matter for further proceedings to determine and award Advent appropriate attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Contract*

Advent, a general contractor, and SJC, the property owner and developer, entered a written construction agreement in September 2014 for Advent to build a 298-unit apartment complex for SJC in the city of Ontario. The parties agreed SJC would pay Advent’s construction costs, plus a fee to manage the project, with a guaranteed maximum price of approximately \$36 million (GMAX total). Specifically, through periodic progress payments, Advent would earn \$1.1 million as its general contracting fee and in similar periodic payments SJC would reimburse Advent for materials and labor, including those furnished or performed by subcontractors.

In each progress payment, SJC had the right to withhold 10 percent of the portion allocated to Advent’s fee (retention amounts), releasing and paying the accumulated retention amounts once the project was substantially complete. If the

project came in under the \$36 million budgeted, Advent was entitled to 20 percent of the savings. In turn, SJC was not responsible for costs that exceeded the \$36 million GMAX total.

The contract included an attorney fees provision for the prevailing party in any dispute arising out of the contract. The parties also agreed to resolve any disputes through a “general judicial reference” by the superior court to a referee at JAMS, and to other alternative dispute resolution measures, including mediation before any reference trial.

While the parties contemplated construction would take approximately 18 months, and therefore scheduled March 29, 2016, as the target completion date, they provided for overruns and delays. Advent was entitled under the contract to request reimbursement known as “general conditions” for delays attributable to SJC, including change orders, or delays that otherwise were not Advent’s fault, such as obtaining local government permits. The parties subsequently stipulated that each day extending Advent’s general contractor obligation under the general conditions provision would earn Advent an additional \$2,824.46.

The contract also gave SJC the right to liquidated damages for each day of delay attributable to Advent. The amount varied according to what remained to be completed, but as relevant here, the liquidated damages daily rate was \$1,850.

The project consisted of eight phases to build 15 apartment buildings and a leasing office in a three-story, multifamily residential development known as Vistara. Phase 1 consisted of onsite improvements, Phase 2 included the leasing office, pool, and one of the apartment buildings, and Phases 3 through 8 were dedicated to finishing the remaining 14 apartment buildings.

As the referee eventually observed in his statement of decision, “After work commenced, the project soon got ahead of schedule by several months. However, in April of 2015 it began to experience significant delays. The cause and significance of these delays forms the basis for the dispute in this matter.”

B. *The Complaint*

In May 2016, Advent sued SJC for \$1,115,228 in damages, alleging SJC failed to timely pay Advent’s applications for progress payments while also threatening to seek substantial liquidated damages against Advent for delay. Advent sought damages for breach of contract and a declaratory judgment of its rights under the contract. Advent specified its damages claim consisted of approximately \$243,000 in general condition amounts due for delays SJC caused and about \$873,000 in “unpaid payment applications.” According to SJC, it paid Advent’s lone outstanding payment application in full for \$873,000 within three days of Advent filing the complaint, and its payment on the application was “not late,” but rather timely paid within 30 days after Advent submitted the application with complete documentation as required by the contract. According to SJC, it also promptly paid in June 2016 “Advent’s only outstanding change order request for delay compensation.”

SJC believed Advent had “jumped the gun” by going to court and pursuing the reference because “Advent agreed” in the parties’ contract “that judicial reference shall be deferred until the project was completed, and that Advent shall carry on its work pending judicial reference.” It appears Advent remained on the project site through August 2016, when SJC asserted Advent “walked off the job.” The referee found the project had been completed in “late July 2016.”

C. *The Cross-Complaint*

Meanwhile, in early August 2016, SJC filed a cross-complaint against Advent alleging breach of contract and seeking a declaration of its rights under the contract. SJC sought \$400,000 in liquidated damages “arising from Advent’s unexcused delay in the performance of the Construction Contract.” In its declaratory judgment cause of action, in addition to a determination it was entitled to per diem liquidated damages, SJC contended “that Advent filed this action prematurely.” SJC did not request specific relief for this alleged contractual violation, except “as may be necessary to protect Owner’s rights and interests,” but expressed concern that “Advent may threaten to stop its work on the Project based on its contention that Owner is liable to Advent for any losses resulting from the construction delays.”

D. *The First Amended Complaint*

The referee granted Advent’s motion to file a first amended complaint (FAC) in March 2017. The FAC restated causes of action for breach of contract and declaratory relief, but increased the damages claim to almost \$3.6 million, plus “a share of the project savings currently believed to be in excess of \$119,500.94.”

Of the \$3.6 million “for the unreimbursed cost of the work,” Advent identified approximately \$2.8 million as “progress payments and final retention payments that are overdue.” Roughly another \$500,000 was for “uncompensated changes in the work that Advent performed at Owner’s direction,” other “allowance items Advent performed at Owner’s direction in excess of the amount budgeted in the . . . contract,” and for contingency sums SJC already had “reallocated to cover [its] change orders.” Advent apparently sought the \$500,000 not to be paid out in damages, but as adjustments contemplated under contingency provisions in the contract to ensure it did not exceed the GMAX total cost. As another component of the \$3.6 million figure, Advent sought about \$370,000 in “general condition expenses from delays.”

Advent also alleged a new cause of action in the FAC; specifically, a prompt payment claim under Civil Code sections 8800 and 8818 on grounds that SJC failed “to timely pay” Advent the \$2.85 million in “progress payments and final retention payments that are overdue” Advent sought as its statutory remedy an order directing SJC, “in addition to paying the [\$2.85 million] balance, [to] pay to Advent a charge of two percent per month on the improperly withheld amount” and “reasonable attorney’s fees pursuant to Civil Code sections 8800 and 8818.”

E. *The Trial, Including Pre- and Post-Trial Briefing*

In the months and weeks leading up to trial, SJC satisfied much of Advent’s liability to its subcontractors by direct payments to them instead of to Advent. SJC blamed payment delays on Advent for “su[ing] SJC’s lender in a separate action to recover on a stop payment notice,” causing a delay in its construction loan disbursements when “SJC had to set up a time-consuming process with its construction lender to pay the subcontractors through an escrow.”

Based on those payments, Advent in its trial brief reduced its claim for payments SJC owed on work completed from about \$2.8 million in its first amended complaint to approximately \$1.5 million. Advent continued to seek approximately \$370,000 in general condition extensions, which Advent specified stemmed from 104 days of delay caused by SJC. Advent had not previously identified an exact figure for retention sums due once the project was complete, but now specified \$110,000.

SJC in its trial brief increased its liquidated damages claim from \$400,000 in the cross-complaint to \$1,145,200, based on its projected calculation of damages to prove at trial.

Following a five-day trial in March 2017, the parties submitted further briefs after the close of evidence. The referee ordered the parties’ accounting departments to meet to determine what, if anything, was still owed to Advent’s

subcontractors. In its post-trial brief, Advent substantially reduced its pretrial claim for \$1.5 million for work performed, based on further escrow payments SJC had made. Advent asserted, “Advent and SJC met after trial as directed by the Referee, reconciled the accounting records, and determined that the balance due to the subcontractors is \$338,042.42.”

In light of SJC’s recent payments and apparently confident that SJC would satisfy the remainder of Advent’s \$2.8 million work-performed claim sought in its FAC, Advent reduced its prompt payment claim to interest on \$110,000 of Advent’s general contracting fee that SJC retained from progress payments, despite Advent’s claim it timely completed the project. Advent requested that the referee award the prompt payment interest penalty of two percent monthly *only* for the last six months, beginning in December 2016, which it calculated as the “triggering [date for] payment of the balance of the contractor’s fee.”

SJC in its post-trial brief disputed responsibility for the \$338,000 figure. SJC agreed the subcontractors “have submitted invoices that remain unpaid in [that] amount,” but argued it “exceeds the budgeted amounts for those subcontractors.” SJC also asserted the “invoiced amounts . . . exceed the guaranteed maximum price” in the parties’ contract, even “as modified by Change Orders.” “Thus,” according to SJC, it was “not liable for these invoices.” Put another way, SJC argued that “Advent did not bear its burden of proving that the disputed amounts are within the contract budget.”

F. *The Statement of Decision*

The referee issued a statement of decision with detailed findings, including that Advent “reached substantial completion on each of the eight phases between February 2016 and late July 2016,” while the contract had “contemplated an overall completion date of March 29, 2016.” Observing that SJC had approved some delay

allowances requested by Advent, Advent nevertheless “worked on the project . . . three months longer than the approved delays.”

Consequently, the referee explained “[t]he most significant dispute in this matter revolves around [Advent’s] request for 104 additional days on the timeline for substantial completion of the project” because “[w]ith the additional time, Advent is entitled to their General Conditions.” On the other hand, “[w]ithout the additional time, SJC may be entitled to liquidated damages for Advent’s failure to meet the completion schedule.”

The referee found SJC to be estopped from asserting Advent could not request a general conditions award because it failed to use a “Project Delay Notification form” or otherwise failed to document or timely provide notice of its delay requests. The referee credited Advent witness testimony that “[t]hey were told not to use the form” and told by SJC that “delays and progress o[n] the project would be discussed informally in the future.” While noting “speculation from the witnesses as to why [SJC] didn’t want the delays ‘formally’ noted,” the referee explained, “The reason does not matter” because “[t]he effect” was equitable estoppel.

The referee found the testimony given by an SJC witness stating “that he discussed the issue of liquidated damages every time a new project schedule was presented at the weekly meetings” to “lack credibility.” The referee also found that “notice of SJC’s claim for liquidated damages was not timely, except for its claim as to Phase 8,” thereby constraining SJC’s liquidated damages claim to at most 21 days.

The referee ruled that “after reviewing the evidence in its entirety, 94 of the 104 days requested are days beyond the control or fault of Advent and should be added to the completion schedule.” Multiplying 94 days by the daily general conditions rate of \$2,824.46 that the parties stipulated to during trial, the referee awarded Advent \$265,499.24—or approximately 72 percent—of the \$370,000 it had requested in its first amended complaint and trial brief on its general conditions claim.

The referee awarded SJC \$1,850 per day for Advent's 10 days of unexcused delay, for a total of \$18,500 in liquidated damages, compared to \$400,000 that SJC asserted in its cross-complaint and \$1,145,000 asserted in its trial brief.

Finding that "[a]s of this time, the remaining unpaid subcontractors are owed \$338,042.41," the referee ordered SJC to "pay the subcontractors" and retained jurisdiction to "ensure" it did. The referee also ordered SJC to pay Advent its \$110,000 in retained fees and \$43,773.21 as Advent's 20 percent share of the project cost savings.

In declining to order Advent to absorb the subcontractors' outstanding bills, and by ordering SJC to pay them and to pay Advent's retained contracting fee and costs savings share, the referee implicitly determined that Advent did not exceed the GMAX total price.

The referee rejected Advent's prompt payment claim. The referee found "there was a good faith dispute between the Parties regarding the payments owed by SJC to Advent and therefore there is no entitlement to prompt payment penalties pursuant to California Civil Code Sections 8800 and 8818."

Concluding that "neither party prevailed *in the entirety* of its claims and both Parties prevailed to some extent," the referee found "there is no prevailing party." (Italics added.) Consequently, the referee did not award attorney fees to either party as the prevailing party under Civil Code section 1717 or costs of suit under Code of Civil Procedure section 1032.

G. *Objections and Amended Statement of Decision*

Advent filed objections to the statement of decision, limited to the prevailing party issue. Advent argued it was the prevailing party for purposes of costs because it was "the party with a net monetary recovery" under the governing statute. (Code. Civ. Proc., § 1032, subd. (a)(4).) Advent also argued it was the prevailing party

for purposes of contractual attorney fees under Civil Code section 1717 because it obtained “greater relief in the action.”

The referee amended the statement of decision to award Advent its costs as the prevailing party, but not attorney fees. The trial court entered the referee’s amended statement of decision as the judgment, and Advent now appeals; SJC does not cross-appeal the judgment.

DISCUSSION

Advent contends reversal is required because governing law entitles a party to recover its contractual attorney fees when the party gains a “lopsided” victory on its contract claims. (*de la Cuesta, supra*, 193 Cal.App.4th at p. 1295.) We agree because case law interpreting section 1717 has circumscribed trial court discretion in this area.

Civil Code section 1717, subdivision (b)(1), sets out the standard for determining the prevailing party when, as here, the parties’ contract provides for attorney fees. The statute states: “The court, upon notice and motion by a party, shall determine who is the party prevailing on the contract for purposes of this section, whether or not the suit proceeds to final judgment. [T]he party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract. The court may also determine that there is no party prevailing on the contract for purposes of this section.” (*Ibid.*)

The Supreme Court has concluded that “in deciding whether there is a ‘party prevailing on the contract,’ the trial court is to compare the relief awarded on the contract claim or claims with the parties’ demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources. The prevailing party determination is to be made only upon final resolution of the contract claims and only by ‘a comparison of the extent to which each party ha[s] succeeded and failed to succeed in its contentions.’” (*Hsu v. Abbara* (1995)

9 Cal.4th 863, 876 (*Hsu*).) In determining litigation success, “courts should respect substance rather than form, and to this extent should be guided by ‘equitable considerations.’” (*Id.* at p. 877.) As an example, “a party who is denied direct relief on a claim may nonetheless be found to be a prevailing party if it is clear that the party has otherwise achieved its main litigation objective.” (*Ibid.*)

The trial court, however, “may not invoke equitable considerations unrelated to litigation success, such as the parties’ behavior during settlement negotiations or discovery proceedings, except as expressly authorized by statute.” (*Hsu, supra*, 9 Cal.4th at p. 877.) “To admit such factors into the ‘prevailing party’ equation would convert the attorney fees motion from *a relatively uncomplicated evaluation of the parties’ comparative litigation success* into a formless, limitless attack on the ethics and character of every party who seeks attorney fees under section 1717.” (*Ibid.*, italics added.) As the high court observed, “The words ‘shall be entitled’ reflect a legislative intent that a party prevailing on a contract receive attorney fees *as a matter of right* (and that the trial court is therefore *obligated* to award attorney fees) whenever the statutory conditions have been satisfied. This language would be incongruous if, as the Hsus contend, trial courts retained virtually unlimited discretion to deny attorney fees under section 1717 on equitable grounds.” (*Id.* at p. 872, original italics.)

When one party achieves a “simple, unqualified victory” on the contract claims, that party is the prevailing party as a matter of law. (*Hsu, supra*, 9 Cal.4th at p. 877.) In mixed result cases, “when the decision on the litigated contract claims” is *not* “purely good news for one party and bad news for the other” (*id.* at p. 876), the trial court has discretion to determine which party, if any, prevailed. (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1109.) Nevertheless, the trial court’s discretion in mixed result cases is not unlimited.

In *Silver Creek, LLC v. BlackRock Realty Advisors, Inc.* (2009) 173 Cal.App.4th 1533 (*Silver Creek*), the court held that the trial court erred in refusing

to declare a real estate seller the prevailing party, even though the seller lost one of the two main issues. The seller, Silver Creek, sought a declaration that it had validly terminated a \$29.75 million real estate transaction and was entitled to retain the buyer's \$1.13 million deposit. The seller prevailed on the termination issue but lost on the deposit issue. The trial court determined there was no winner "because each party won one of the claims presented for resolution." (*Id.* at p. 1540.)

The Court of Appeal noted that the trial court "oversimplified its duties" by merely "counting the number of contract claims presented." (*Silver Creek, supra*, 173 Cal.App.4th at p. 1540.) The appellate court reasoned, "The record reveals that the property issue was most important to the parties and 'greater' in terms of monetary value—about \$29.75 million at issue for the properties versus about \$1.13 million at issue for the deposit. Thus, Silver Creek achieved its main litigation objective, while BlackRock clearly failed to accomplish its desired goal even though it obtained the return of its deposit." (*Ibid.*) The trial court thus abused its discretion in finding neither party prevailed because "[t]he record indisputably shows that Silver Creek obtained the greater relief on the contract." (*Id.* at p. 1541.)

The disparity evident in *Silver Creek* is also evident here. Advent recovered hundreds of thousands of dollars on its contract claims, including more than \$265,000 in general conditions, \$110,000 in retention, and more than \$43,000 for project savings—totaling approximately \$418,000—while SJC recovered only \$18,500 in liquidated damages. SJC correctly argues that the referee was not required to make a simple mathematical comparison of the amounts recovered by each side. As *Hsu* instructed, the determining factor is the parties' comparative success relative to their litigation objectives. (*Hsu, supra*, 9 Cal.4th at pp. 876-877.)

But the disparity is just as prominent by this measuring stick. The \$18,500 SJC recovered was only 1.6 percent of the \$1,145,000 in liquidated damages it sought at trial, or 4.6 percent of the \$400,000 liquidated damages figure it asserted in its

cross-complaint. Meanwhile, the \$265,000 Advent recovered for general conditions was 72 percent of the \$370,000 it sought for delay in its first amended complaint, a figure that remained the same in Advent's trial brief.

The referee identified responsibility for project delays as the "most significant dispute in this matter," and on that score Advent overwhelmingly prevailed when the referee attributed 94 of the 104 days at issue "to the delays of SJC as a result of unanswered RFIs, changes in plans, extra work, instructions to stop work and delays by the City" Advent recovered 100 percent of the \$110,000 in retention it sought.

While the \$43,000 Advent recovered for its share of project savings was only 36 percent of the \$119,000 figure it identified in its FAC as the total project savings, Advent asked only for its contractual "share" of the total savings, not the full amount. Moreover, the savings figure was difficult to calculate because it depended so heavily on the amount owed to the subcontractors and whether Advent exceeded the GMAX total cost figure. Under the parties' contract, if the project exceeded the total GMAX figure, SJC was absolved of any further costs, and therefore Advent would not only have to forego its remaining \$110,000 retention fee, but also, as the general contractor, absorb and pay its subcontractor costs. On each of these yardsticks, Advent prevailed, with SJC footing the cost for all the subcontractors' outstanding bills, including the \$338,000 expressly contested and litigated at trial, and Advent gained its entire \$110,000 retention fee and a portion of the project savings because it came in under budget.

SJC contends its marginal liquidated damages recovery should not count against it because "[c]ompeting cross-claims are often unequal in magnitude at the outset." While that may be true in theory, it was not the case here. SJC's claim for \$1,145,000 in liquidated damages due to delay dwarfed Advent's general conditions delay claim for \$370,000 in its FAC and trial brief. This only cast SJC's minimal success on its litigation objectives in sharper relief.

SJC also characterizes its cross-claim as “essentially defensive in nature.” The referee apparently adopted this approach, viewing SJC’s liquidated damages claim as an attempt to “cancel out” the delay amounts sought by Advent. The greater magnitude of SJC’s delay claim does not support this approach as a measurement of success on the parties’ litigation objectives. In any event, SJC did not achieve a recovery that would offset or “cancel out” Advent’s recovery.

Additionally, while the magnitude of Advent’s claims decreased as trial approached, from \$3.6 million in its FAC to \$338,000 in its post-trial brief for outstanding subcontractor amounts, the reduction occurred because SJC paid millions in subcontractor claims preceding trial. The record shows the reduction did *not* stem from Advent abandoning any claims, but instead from SJC satisfying them by paying the subcontractors their due, which Advent sought as a litigation objective because if it exceeded the GMAX limit, Advent was liable for those amounts.

SJC contends it “always” intended to pay what was “legitimately owed” to the subcontractors, and Advent thus created a “false dispute” by seeking payment of subcontractor costs as a litigation objective. SJC asserts, “There was zero evidence at trial, none whatsoever, that SJC ever contended it was not obligated to pay any portion of the outstanding contractor claims.” As noted above, however, SJC argued in its closing trial brief (submitted after the referee heard the evidence) that because Advent exceeded total GMAX costs SJC was not responsible for the \$338,000 in outstanding subcontractor claims. SJC did not establish that Advent overstated amounts due to the subcontractors and, in any event, Advent achieved its litigation objective of proving SJC was responsible for any sums due, not Advent.

SJC emphasizes that it prevailed on Advent's prompt payment claims, while Advent disputes the relevance of these statutory claims to the issue of contractual attorney fees. SJC relies on analogous authority that a party's success or failure on underlying contractual claims bears on determining the prevailing party for attorney fees authorized under prompt payment statutes because ascertaining whether payment is timely under those statutes is “intertwined” with the underlying contract. (*James L. Harris Painting & Decorating, Inc. v. West Bay Builders, Inc.* (2015) 239 Cal.App.4th 1214, 1222-1223.) The converse issue is presented here, i.e., whether Advent's failure on its prompt payment claims affects the determination of whether it succeeded on its contract claims in the litigation. The existence of a separate right to attorney fees in the prompt payment statutes—and the nature of that right effectively as a penalty enhancement for violating payment timeliness requirements—may counsel against finding the absence of a violation affects whether a party succeeded in proving a breach of contract when the contract itself provides for contractual attorney fees.

Even assuming, however, that Advent's lack of success on its prompt payment claims is relevant, it must be viewed in the context of Advent's overall litigation success. As the court explained in *Silver Lake*, it is not simply a matter of “counting the number of . . . claims presented.” (*Silver Creek, supra*, 173 Cal.App.4th at p. 1540.) Here, when it became clear SJC was paying the subcontractors through the escrow process in collateral proceedings, the importance of the prompt payment issue diminished. Advent limited its prompt payment statutory claim to interest on the \$110,000 in overdue retention, and calculated the overdue period as beginning approximately four months before the reference trial, which turned out to be about six months before the referee's statement of decision. Calculating two percent monthly on the past-due amount of \$110,000 yields just \$13,200, which, even when combined with SJC's \$18,500 in liquidated damages, still pales in comparison to Advent's \$419,000 recovery.

DISPOSITION

The judgment is reversed, and the matter is remanded for further proceedings to determine Advent's attorney fees as the prevailing party on its contract claims. Advent is entitled to its costs on appeal.

GOETHALS, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.